

Supreme Court No. 78876-6
Consolidated with Nos. 79074-4 and 78611-9 (lead case)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARO TE JHON WILLIAMS-WALKER,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER CURTIS GRAHAM

RECEIVED
COURT OF APPEALS
DIVISION ONE

AUG 28 2008

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
08 SEP -2 AM 8:02
BY RONALD R. CARPENTER
JERK

SUSAN F. WILK
Attorney for Petitioner Curtis Graham

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT	1
B. ISSUE PRESENTED FOR REVIEW.....	2
C. STATEMENT OF THE CASE	2
D. ARGUMENT	6
1. UNDER WASHINGTON'S "LAW OF THE CASE DOCTRINE" AND THE WASHINGTON CONSTITUTION'S BROAD JURY- TRIAL GUARANTEE, THE JURY'S FINDING THAT GRAHAM WAS ARMED WITH A DEADLY WEAPON FOR PURPOSES OF A SPECIAL VERDICT PRECLUDED IMPOSITION OF A FIREARM ENHANCEMENT.....	6
a. Washington's "law of the case doctrine" provides that the instructions given by the trial court are the "law of the case," and, applied here, precludes imposition of a firearm enhancement when the law of the case required the jury only to find a deadly weapon.....	6
b. Washington's jury-trial right, which is broader than the right which exists under the Sixth Amendment, required the jury to find the weapon in question was a "firearm" to support an enhanced penalty for a firearm	9
2. THE LANGUAGE IN THE SPECIAL VERDICT FORM TELLING THE JURY A FIREARM IS A DEADLY WEAPON CONSTITUTED A JUDICIAL COMMENT ON THE EVIDENCE, IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION.....	12
3. PURSUANT TO RAP 10.1(g), GRAHAM ADOPTS AND INCORPORATES BY REFERENCE THE ARGUMENTS OF PETITIONERS RUTH AND WILLIAMS-WALKER.....	14
E. CONCLUSION.....	15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>City of Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.3d 618 (1982)	9
<u>Pepperall v. City Park Transit Co.</u> , 15 Wash. 176, 45 P. 743, 46 P. 407 (1896)	6
<u>Peters v. Union Gap Irr. District</u> , 98 Wash. 412, 167 P. 1085 (1917)	6
<u>Schatz v. Heimbigner</u> , 82 Wash. 589, 144 P. 901 (1914)	8
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006)	13
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1231 (1997)	12, 13
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	14
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	6, 7
<u>State v. Jackman</u> , 156 Wn.2d 736, 132 P.3d 136 (2006)	13
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995)	7
<u>State v. Monson</u> , 113 Wn.2d 833, 784 P.2d 485 (1989)	7
<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005)	4, 5
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	5, 8, 9, 11, 14
<u>State v. Smith</u> , 150 Wn.2d 135, 95 P.3d 934 (2003)	9

Washington Court of Appeals Decisions

<u>State v. Barringer</u> , 32 Wn. App. 882, 650 P.2d 1129 (1982)	7
<u>State v. Nam</u> , 136 Wn. App. 698, 150 P.3d 617 (2007)	7

<u>State v. Pharr</u> , 131 Wn. App. 119, 126 P.3d 66 (2006)	10, 11
--	--------

Washington Constitutional Provisions

Const. art. I, § 21	9
Const. art. I, § 22	9
Const. art IV, § 16	12

United States Supreme Court Decisions

<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)	5
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)	5

United States Constitutional Provisions

U.S. Const. amend. 6	9
----------------------------	---

Statutes

RCW 9.41.010	4
RCW 9.94A.310	4
RCW 9.94A.510	4
RCW 9.94A.533	11
RCW 9.94A.602	4

Rules

RAP 10.1(g)	14
-------------------	----

A. SUMMARY OF ARGUMENT

In Washington, the court's authority to impose punishment derives entirely from the jury's verdict based on the instructions they are given. This fundamental rule is reflected in Washington's constitutional right to a jury trial, which is more protective than the right which exists under the federal constitution, in Washington's "law of the case" doctrine, which provides the court's instructions given without exception are the law of the case, and in Washington's constitutional prohibition on judicial comments on the evidence.

The State sought to punish petitioner Curtis Graham for committing a crime while armed with a firearm, but the State submitted special verdict instructions which directed the jury to find only whether the State had proved beyond a reasonable doubt that he was armed with a deadly weapon. At sentencing, the court made its own finding that Graham was armed with a firearm and on this basis imposed a five-year sentence enhancement. Graham asks this Court to hold that under Washington law, the State's failure to submit jury instructions requiring a proper finding that he was armed with a firearm precluded imposition of a firearm enhancement. The remedy is reversal and remand for imposition

of the two-year sentence authorized by the jury's special verdict for a deadly weapon.

B. ISSUE PRESENTED FOR REVIEW

Whether Washington law precludes the imposition of penalties which exceed the facts reflected in the jury's verdict based on the instructions the jury is given.

C. STATEMENT OF THE CASE

Based on an incident that occurred on January 14, 2004, the Snohomish County Prosecuting Attorney charged petitioner Curtis Graham with one count of first degree assault with a firearm enhancement and one count of violation of the Uniform Firearms Act in the second degree. CP 111-12.

Count 1 of the information, charging first degree assault, alleged:

That the defendant, on or about the 14th day of January, 2004, with intent to inflict great bodily harm, did assault another person, to-wit: Mohammed Sylla, with a firearm and any deadly weapon and by any force or means likely to produce great bodily harm or death, to-wit: a .380 caliber pistol; proscribed by RCW 9A.36.011(1)(a), a felony; and that at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602.

CP 111.

At trial, the prosecutor did not submit jury instructions asking the jury to decide whether Graham was armed with a firearm for purposes of the enhancement. Instead, the prosecutor requested the jury find by special verdict only that Graham was armed with a deadly weapon as to the assault count. CP 133-34, 138.

Instruction 19, proposed by the State and issued by the court, read:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the assault.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

CP 73. No further clarification of the term, "firearm" was issued to the jury, either with respect to the special verdict or the underlying charges.

The jury convicted Graham of both counts as charged and answered "yes" to the special verdict. CP 46-48. The special verdict form read,

We the jury return a special verdict by answering as follows:

Was the defendant, CURTIS EUGENE GRAHAM armed with a deadly weapon at the time of the commission of the crime in Count 1?

ANSWER: Yes.

CP 47.

At sentencing, the court made an additional factual finding that "A special verdict/finding for use of a **deadly weapon** which was a **firearm** was returned on [Count] I RCW 9.94A.602, 510, 310; 9.41.010." CP 22 (emphasis in original). Based on this additional factual finding, the court imposed a 221-month sentence on Count I, which included 60 months for the firearm enhancement. CP 23, 26.

On appeal, Graham argued that his exceptional sentence had to be struck down under this Court's opinion in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) (hereafter "Recuenco I"). Division One disagreed, finding Recuenco I did not apply:

The jury specifically convicted Graham of unlawful possession of a firearm. Also, they could not have convicted Graham of first degree assault without finding that he was armed with a firearm.

Slip Op. at 16.

Graham petitioned for review to this Court, but this Court stayed consideration of Graham's petition because the United States Supreme Court had granted the State's petition for a writ of certiorari of Recuenco I.

The Supreme Court reversed Recuenco I to the extent this Court had found the error was structural, explaining the error was subject to the harmless error analysis set forth in Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Washington v. Recuenco, 548 U.S. 212, 218-22, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (hereafter "Recuenco II"). On remand, this Court concluded that under Washington law, harmless error analysis does not apply where a sentencing factor was not submitted to the jury, and affirmed Recuenco I. State v. Recuenco, 163 Wn.2d 428, 431, 180 P.3d 1276 (2008) (hereafter "Recuenco III").

This Court subsequently lifted the stay in Graham's case, granted review on the firearm enhancement issue only, and consolidated the case with two other cases presenting similar questions.¹ Graham asks this Court to hold that under Recuenco III, the imposition of the firearm enhancement was improper, and to remand for resentencing based on the jury's verdict that he was armed with a deadly weapon.

¹ The cases are State v. Williams-Walker, No. 78611-9, and State v. Ruth, No. 79074-4.

D. ARGUMENT

1. UNDER WASHINGTON'S "LAW OF THE CASE DOCTRINE" AND THE WASHINGTON CONSTITUTION'S BROAD JURY-TRIAL GUARANTEE, THE JURY'S FINDING THAT GRAHAM WAS ARMED WITH A DEADLY WEAPON FOR PURPOSES OF A SPECIAL VERDICT PRECLUDED IMPOSITION OF A FIREARM ENHANCEMENT.

a. Washington's "law of the case doctrine" provides that the instructions given by the trial court are the "law of the case," and, applied here, precludes imposition of a firearm enhancement when the law of the case required the jury only to find a deadly weapon. The law of the case doctrine is an established doctrine dating to the earliest days of statehood. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896) and Peters v. Union Gap Irr. District, 98 Wash. 412, 413, 167 P. 1085 (1917)).² The doctrine holds that jury instructions not objected to become the law of the case. Id.

In the criminal context, under the "law of the case doctrine", the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included

² In Peters, this Court declared the doctrine to be so well-established "that the assembling of the cases is unnecessary." Id. at 413.

without objection in the "to convict" instruction. Hickman, 135 Wn.2d at 102 (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)); see also State v. Barringer, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982) (where "to convict" instruction required jury to find valium was a "controlled substance," this became the law of the case and an added element the State had to prove), overruled in part on other grounds by State v. Monson, 113 Wn.2d 833, 849-50, 784 P.2d 485 (1989). Where the State has assumed the burden of proving surplusage by including "elements" in the "to convict" instruction, a defendant may assign error to such added "elements" and the court may consider whether the State has met its burden of proving them. Hickman, 135 Wn.2d at 102.

Likewise, under the "law of the case doctrine" a defendant may challenge the sufficiency of instructions which through an omission or scrivener's error alters what the State must prove. See State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007) (although robbery is defined as the taking of personal property from the person of another or in her presence against her will by the use or threatened use of immediate force, the State assumed the burden of proving property was taken from victim's person when it omitted "presence" language from "to convict" instruction). "There is but

one question ... that is, [i]s there sufficient evidence to sustain the verdict under the instructions of the court?" Schatz v. Heimbigner, 82 Wash. 589, 590, 144 P. 901 (1914) (emphasis added).

Here, no instruction required the jury to find Graham was armed with a firearm for purposes of the special verdict. The jury was never instructed on the definition of a "firearm." Cf., Recuenco III, 163 Wn.2d at 437 (noting proof of operability is a necessary predicate for imposition of a firearm enhancement). The special verdict instruction itself did not require the jury to find Graham was armed with a "firearm," only a "deadly weapon."

"The State has the authority and responsibility for bringing charges against a person." Recuenco III, 163 Wn.2d at 433.

Under the law of the case doctrine, the instructions – proposed by the prosecutor and given without exception – became the law of the case. These instructions, in turn, limited the facts the jury found for purposes of the special verdict. The State is now bound by the law it proposed and the court ratified. Because the jury found only that Graham was armed with a deadly weapon, he is entitled to reversal of the sentence enhancement for a firearm and imposition of a corrected sentence based on what was authorized by the jury's verdict.

b. Washington's jury-trial right, which is broader than the right which exists under the Sixth Amendment, required the jury to find the weapon in question was a "firearm" to support an enhanced penalty for a firearm. The same result is compelled under Washington's jury-trial guarantee.

The Washington Constitution protects the right to trial by jury in two provisions. Article I, section 21 of the Washington Constitution provides, "The right of trial by jury shall remain inviolate." Const. art. I, § 21. Article I, section 22 provides, "[i]n criminal prosecutions, the accused shall have the right to ... trial by an impartial jury." Const. art. I, § 22. This Court has construed these provisions to indicate that the Washington constitution provides greater protection for jury trials than the federal constitution: Recuenco III, 163 Wn.2d at 440 (citing State v. Smith, 150 Wn.2d 135, 151, 95 P.3d 934 (2003) and City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.3d 618 (1982)).

Applying this broad jury-trial right, in Recuenco III this Court concluded the jury verdict finding only that Recuenco was armed with a deadly weapon precluded imposition of a firearm enhancement: "[w]ithout a jury determination that he was armed with a 'firearm,' the trial court lacked authority to sentence

Recuenco for the additional two years that correspond with the greater enhancement." Recuenco III, 163 Wn.2d at 440.

As in Recuenco, Graham's jury was not asked to find anything other than a deadly weapon for the special verdict, and was not provided with instructions or definitions that would have narrowed an otherwise-ambiguous finding. This case must, therefore, be distinguished from the Court of Appeals opinion in State v. Pharr, 131 Wn. App. 119, 126 P.3d 66 (2006).

In Pharr, although the special verdict form referred to a "deadly weapon," the jury was instructed specifically and correctly that the State had to prove beyond a reasonable doubt "that the defendant was armed with a firearm at the time of the commission of the crime," and was further told "A firearm is a weapon or a device from which a projectile may be fired by an explosive such as gunpowder." Pharr, 131 Wn. App. at 124.

Here, in contrast, the jury was told only that "the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the assault." CP 73. Although the jury was informed that "[a] pistol, revolver, or other firearm is a deadly weapon whether loaded or unloaded," id., this instruction did nothing to ensure the jury's special verdict was

based on a finding that the weapon in question was in fact a firearm. Instead, the judge made this additional finding when he determined, "A special verdict/finding for use of a **deadly weapon** which was a **firearm** was returned on [Count] I." CP 22.

In affirming Graham's sentence, Division One could not point to a jury instruction which established the jury had found the facts necessary to impose the enhanced penalty, as in Pharr. Cf., Slip Op. at 16 with Pharr, 131 Wn. App. at 124 ("verdicts incorporate the instructions on which they are grounded and reflect the facts required to be found as a basis for decision.").

As in Recuenco III, "the State specifically (and properly) add[ed] an enhancement allegation and ask[ed] the jury to make the specific finding supporting the enhancement sought" – i.e., a deadly weapon enhancement. 163 Wn.2d at 441. As in Recuenco III, "the error occurred during the sentencing proceedings when the sentencing judge exceeded the authority issued to the court by the jury's determination." Id.

This error caused the court to add five years to Graham's sentence, instead of the two years authorized by the jury's verdict. RCW 9.94A.533. As in Recuenco III, the firearm sentence must be

vacated and the sentence corrected to reflect the facts actually established by the jury's verdict. Id. at 442.

2. THE LANGUAGE IN THE SPECIAL VERDICT FORM TELLING THE JURY A FIREARM IS A DEADLY WEAPON CONSTITUTED A JUDICIAL COMMENT ON THE EVIDENCE, IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION.

As the judgment and sentence illustrates, the firearm finding was made by the court, not the jury, in violation of Washington's right to a jury trial. But to the extent the special verdict instruction referenced a firearm, this Court should hold the portion of the instruction telling the jury "a ... firearm is a deadly weapon" was an impermissible judicial comment on the evidence.

Judicial comments on the evidence are explicitly prohibited by the Washington constitution. Const. art IV, § 16.³ This Court has interpreted this section as forbidding a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge's opinion is expressly stated but

³ Article IV, section 16 reads "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

portion stricken per
notation ruling of
11-26-08

where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission "conveys the idea that the fact has been accepted by the court as true." Levy, 156 Wn.2d at 726.

In Becker and Jackman, this Court found improper comments warranted reversal where the comments concerned questions that were highly contested or the principal issues in the case. Jackman, 156 Wn.2d at 744 (judicial comment removed material fact from the jury's consideration); Becker, 132 Wn.2d at 65 (finding comment "tantamount to a directed verdict").

This Court should similarly hold the instruction telling the jury "a firearm ... is a deadly weapon" was tantamount to a directed verdict, and violated the Washington constitution's prohibition on judicial comments on the evidence. The firearm enhancement must be reversed.

3. PURSUANT TO RAP 10.1(g), GRAHAM ADOPTS
AND INCORPORATES BY REFERENCE THE
ARGUMENTS OF PETITIONERS RUTH AND
WILLIAMS-WALKER.

RAP 10.1(g) provides that where cases are consolidated for review, a party may adopt by reference any part of the brief of another. Pursuant to this rule, Graham adopts and incorporates Ruth's independent state constitutional analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), as well as the supplemental arguments of Ruth and Williams-Walker under Recuenco III.

E. CONCLUSION

This Court should hold that when the State submitted instructions that required the jury to find only that Graham was armed with a deadly weapon, and in accordance with the instructions it was given the jury made this finding, these instructions became the "law of the case." This same result is compelled under an application of the jury-trial right afforded criminal defendants by the Washington constitution. When it exceeded the punishment authorized by the jury's verdict, the sentencing court exceeded its authority. The remedy is reversal and remand so the sentence may be corrected.

DATED this 28th day of August, 2008.

Respectfully submitted:



SUSAN F. WINK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner Curtis Graham

RECEIVED
COURT OF APPEALS
DIVISION ONE
AUG 28 2008

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

ARO TE JHON WILLIAMS-WALKER,

PETITIONER.

NO. 78876-6

RECEIVED
COURT OF APPEALS
DIVISION ONE

AUG 28 2008

CERTIFICATE OF SERVICE

I, ANN JOYCE, CERTIFY THAT ON THE 28TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER GRAHAM** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY
SPOKANE COUNTY PROSECUTOR'S OFFICE
1100 W. MALLON AVENUE
SPOKANE, WA 99260-0270

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] SETH FINE
SNOHOMISH COUNTY PROSECUTOR
3000 ROCKEFELLER
EVERETT, WA 98201

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] SUSAN GASCH
GASCH LAW OFFICE
PO BOX 30339
SPOKANE, WA 99223

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] ANDREW ZINNER
NIELSEN BROMAN KOCH, PLLC
1908 E MADISON ST.
SEATTLE, WA 98122

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] CURTIS GRAHAM
988437
WSP
1313 N 13TH AVENUE
WALLA WALLA, WA 99362

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2008.

X. 